UNITED STATES – ANTI-DUMPING MEASURES ON CERTAIN HOT-ROLLED STEEL PRODUCTS FROM JAPAN

(WT/DS184)

Arbitration on the "Reasonable Period of Time"

Statement of the United States at the Oral Hearing

January 18, 2002

1. Good morning, Mr. Feliciano and members of the Japanese delegation. Mr. Feliciano, the United States appreciates the opportunity to appear before you today to further explain why the 18 months we have proposed to implement the recommendations and rulings of the Dispute Settlement Body ("DSB") in this case is a "reasonable period of time." We are especially appreciative that you have agreed to provide your expertise as the arbitrator in this proceeding, considering that you have so recently relinquished your duties as an Appellate Body member.

A Reasonable Period of Eighteen Months is Justified

2. We have outlined in our submission why an eighteen-month "reasonable period of time" is justified, consisting of 14 months to the end of the up-coming congressional session for any legislation, followed by a four-month administrative phase. I won't repeat those arguments here, other than to say that this proposed reasonable period of time was based on the practicalities of the U.S. legislative process, past experience in legislative implementation, the technical

complexity of necessary measures, as well as legal and due process requirements.

Japan's 10-Month Recommendation Is Unsupported and Unreasonable.

3. Japan, by contrast, does little more than emphasize that implementation should be "prompt," and then assert that the United States should require no more than seven months to enact legislation, and three months to issue a redetermination consistent with that legislation, for a total time period of 10 months. Mr. Feliciano, we have no quarrel with the fact that implementation of DSB recommendations and rulings must be "prompt." However, mere invocation of this term, or of the fact that implementation should be done in the shortest period possible within the Member's legal system, cannot itself serve to justify an unrealistic and unsupported implementation period. Japan's proposal appears to express nothing more than its desired time frame for implementation, without regard to how the U.S. legislative and administrative process actually operates. Moreover, the very factors that Japan agrees the arbitrator should be considering, and the previous awards it cites, argue for the very period that the United States is proposing. Let's examine this in more detail.

Legislation

4. With respect to enacting legislation on the "all other's" rate, Japan says that 7 months is sufficient, in other words, two months after Congress officially goes back into session next Wednesday, January 23, and less than two months from when it begins substantive work in the first week of February. This allows no time for the legislative steps set forth in the U.S.

submission – pre-legislative work and consultations, transmittal and introduction of proposed legislation in Congress, referral to committees and subcommittees of jurisdiction, public hearings, "mark-ups", reporting of proposed legislation by the committees to the full House and Senate, consideration by the House and Senate, reconciliation of any differences between the House and Senate versions, consideration by the House and the Senate of the reconciled version, and signature by the President. Further, Japan's request ignores the basic reality that legislation in the United States overwhelmingly passes at the end of a congressional session.

5. In its submission, Japan cites several previous Article 21.3 arbitration awards. A consideration of all of these supports the United States request in this proceeding. For example, Japan cites the award in *EC – Beef Hormones* in support of the proposition that implementation should be prompt, without acknowledging that the arbitrator in that case found that "prompt" enactment of legislation requires 15 months.[1] In fact, not one of the arbitral awards cited by Japan involved less than 10 months for legislation. Japan appears to claim that there was an arbitral award of eight months for legislation in *Australia – Salmon*, but this is incorrect. In fact, the arbitrator in that case awarded eight months specifically because the parties agreed that implementation involved an administrative, not legislative, process. The *Australia – Salmon* arbitrator cited *EC – Hormones* in stating that less than 15 months was justified for administrative, as opposed to legislative, changes.[2]

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[1] Japan Submission, para. 28.

[2] *Australia – Salmon*, para. 43.

6. Indeed, it was Japan's own view, in *Japan – Alcohol*, that legislative implementation required, not seven months, but five years. In that case, similar to other cases before and since, the arbitrator decided on a reasonable period of time of 15 months to implement legislative changes. But even in that case, Japan did not implement within 15 months, instead reaching an agreement with the United States for implementation four years after adoption.

7. In fact, in its own submission, Japan cites with approval the ability of the U.S. Department of Commerce to implement a regulatory change in "only eight months".[3] Since it is recognized in arbitration proceedings that legislative changes generally require more time than regulatory ones, Japan's view that 7 months is sufficient for legislation is even inconsistent with its own view of what is "prompt".

8. Nor does Japan's reference to other U.S. legislation implementing DSB rulings support a seven-month time frame. Japan states that amendments to the FSC legislation were enacted three and a half months from the date of introduction of a bill.[4] In fact, however, the FSC implementation was under the SCM Agreement, under which the panel, in its report, specified a particular date for implementation – October 1, 2000 – which was, first, approximately 12 months later and, second, near the end of a legislative session. This is not very different from what we are proposing in this case. Further, the long history and debate over that dispute laid the foundation for significant agreement concerning the legislation, both within Congress and among

[3] Japan Submission, para. 44.

[4] Japan Submission, para. 39

its constituents, well before the bill was introduced in the House on July 27, 2000. Even so, the legislation did not pass Congress until November, close to the end of the legislative session. This example does not support Japan's position that legislation is possible two months after the up-coming legislative session starts, but the U.S. position that the United States needs until the end of that session.

9. The other legislation cited by Japan – the Continuing Dumping and Subsidy Offset Act of 2000, or CDSOA – was passed by Congress at the end of the congressional session. Again, this example supports the U.S. view that legislation is generally completed at that time. Moreover, as the separate dispute on CDSOA makes clear, Japan is well aware that the provision was not new to Congress in 2000, but was first introduced years earlier. Since 1988, similar provisions had been debated and considered by Congress on several occasions. Thus, the actual figure for the time required to pass the CDSOA legislation was 12 years.

10. Finally, Japan cites the arbitrations in *United States – 1916 Act* and *United States – Section 110* as showing that arbitrators have expected prompt legislative action from the United States. What Japan fails to mention, however, is that, in those cases, by "prompt", the arbitrator meant 10 to 12 months – again, for legislation alone – and that, in both cases, the reasonable period of time was extended to the end of the congressional session, as originally requested by the United States.

11. The only support Japan offers for its contention that "all others" legislation can be enacted in less than half the time allowed in other proceedings, is that, in its view, only one word

need be deleted from the statute.[5] Mr. Feliciano, Japan's proposed "fix" addresses the substance of U.S. implementation, which is up to the United States to determine, not Japan. Such issues are beyond the scope of Article 21.3 arbitration proceedings.

12. Further, if Japan is suggesting that the proposed measure is not technically complex, this suggestion is incorrect. The record is clear that the "all others" issue raises questions of technical, practical and legal complexity. I will not delve into all of the specifics today, but the United States provided detailed arguments to both the panel and Appellate Body regarding the practical difficulties in implementing the "all others" rate if the United States were not able to use rates with any element of "facts available". The panel explicitly acknowledged the practical problems inherent in its ruling. I quote: "We recognize that this conclusion has certain practical consequences, as it leaves unclear how Members are to establish the maximum rate of duty applicable to uninvestigated producers or exporters in a case, such as this one, where there are no margins that were not established under the circumstances referred to in Article 6.8." The panel did not provide suggestions, merely stating that their ruling did not make it "impossible" to comply with the obligations of the AD Agreement.[6]

13. Likewise, the Appellate Body acknowledged the practical problems with respect to this issue. The Appellate Body recognized that the Anti-Dumping Agreement created a lacuna that must be overcome in some manner, but did not decide how it could be overcome, only stating

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[5] Japan Submission, para. 41.

[6] Panel report, fn. 71

that various options had been suggested by the parties.[7]

14. Since August 23rd, the United States has had to examine the various options for filling the lacuna that will both be practicable and consistent with the Anti-Dumping Agreement. Once the appropriate option is selected, the United States must then consider how best to implement it. This is not, as Japan asserts now, simply a question of deleting a word and, even if it were, this could not justify an unrealistic period for implementation which ignores legislative realities.

15. We also wish to respond to Japan's argument, at paragraph 36, that "domestic hurdles of a non-legal nature" are irrelevant to the determination of a "reasonable period of time". Japan quotes the U.S. position in previous arbitrations and suggests that this position supports Japan. This is incorrect. The U.S. quotation specifically emphasizes that practical, technical considerations are indeed very relevant to the arbitrator's inquiry: "The question for the arbitrator is what is the shortest period of time in which implementation can *practicably* take place." Japan's sweeping reference to "non-legal hurdles" appears designed to sweep aside such practical, technical considerations. Japan might as well suggest that the only "legal hurdle" facing the Appellate Body as it writes its reports is the requirement that a hearing take place within 30 days of the notice of appeal, and that there is therefore nothing stopping the Appellate Body from issuing its report on day 31. The practical realities of a Member's legislative process can no more be ignored than the practical realities of drafting an Appellate Body report.

16. One of the factors considered by arbitrators is the period of time in which the Member

[7] Appellate Body Report, para. 124.

can achieve implementation *in accordance with its system of government*. Moreover, Arbitrators have concluded that Members are not required to use "extraordinary", rather than normal, legislative procedures. As detailed in our submission, the United States has a complex legislative process in which neither the timetable nor the procedures are controlled by the executive branch of the U.S. government. Even though there are few mandatory time periods in the legislative process, there are practical, "non-legal", factors that dictate the pace of legislation, which cannot be ignored.

17. The U.S. system of government is not a parliamentary system like Japan's, in which the government, through its support by, and control of, a legislative majority, might itself be able to propose legislation and have it passed rapidly (although we note that even with the benefit of this system, Japan still argued in *Japan Alcohol* that it needed a five-year period to fully implement). Rather, the U.S. Congress is independent of the executive branch of the U.S. Government, and operates under its own procedures and timetables. Further, because of the numerous legislative steps required, and as illustrated by the record of the last Congress, both of which were detailed in our written submission, U.S. legislation is, for the most part, passed at the end of a session.

18. In sum, Japan's proposed deadline of March for any implementing legislation is completely unrealistic, and completely unsupported. It is inconsistent with all evidence of what the U.S. legislative process requires, and is at odds with Japan's own citations to examples of "prompt" implementation in other arbitrations. Further, Japan's examples of other U.S. legislation only support the U.S. view that the U.S. legislative process is such that any

implementing legislation cannot be expected to become law until the end of the congressional session, in late October.

Administrative Implementation

19. As both parties acknowledge, following any legislative changes, some amount of time is necessary to implement those changes in the Hot-Rolled Steel antidumping determination. Japan says three months is needed; we say four. Before I turn to this second stage of the reasonable period of time, however, I want to comment on Japan's arguments with respect to other administrative aspects of implementation which would not have to await legislation. These activities are not relevant to the issue of the reasonable period of time, because they can be undertaken within the reasonable period of time that we have proposed. But you should be aware that Japan's estimate of the time constraints in connection with those activities is entirely unreasonable.

20. The arm's length test presents a complicated evidentiary, economic and legal issue. Even before adoption of the report, the Department of Commerce began analyzing various options from a legal and practical standpoint, consulting with both Congress and stakeholders, as required by U.S. law. Once a proposed modification is published in the Federal Register, which we hope will occur shortly, and final consultations are held with Congress, U.S. law provides that the modification cannot be implemented for 60 days.

21. Nor is it true, as Japan asserts at paragraph 49, that recalculating the margins in the Hot-

Rolled investigation based on this modification will be a simple matter of changing programming code based on information already collected. Changing the arm's-length test is expected to require significant new computer programming, with attendant de-bugging. Moreover, application of the new methodology would likely change the universe of sales considered as candidates for measuring the margins. This could result in significant changes that will likely require both careful checking and review and an opportunity for comment from interested parties. This is likely to be a complicated process. We anticipate, however, being able to recalculate margins during the summer months following the change in the arm's-length test, before a reasonable deadline for any legislation.

22. I want to turn now to Japan's argument that the redetermination in the Hot-Rolled Steel case can be completed three months after any legislation. This claim represents a fundamental misunderstanding of what is required to issue this redetermination. Japan submits, at paragraph 47, that the antidumping margins in the Hot-Rolled Steel investigation can be recalculated one month after the enactment of any legislation. We agree that the United States can issue preliminary dumping margin recalculations one month after any legislation, but this does not include the time required for the legal requirements of section 129(d) of the Uruguay Round Agreements Act – and the due process requirements reflected in the Anti-Dumping Agreement itself – that are triggered after this recalculation is completed. As detailed in our written submission, the administrative process will require four months.

23. With regard to the preliminary recalculations which Japan's proposal appears to ignore,

the changes in this dispute are not minor, and parties will need to see such a determination and the materials on which it is based before commenting, if they are to have a full opportunity to defend their interests and have access to information, as required by Antidumping Agreement Articles 6.2 and 6.4. Moreover, a redetermination cannot be issued simultaneously with the implementation of a change in the method of calculating the "all others" rate. As Japan itself has suggested, this method could be quite complicated, involving a recalculation of the margins of investigated companies that exclude any "facts available". Therefore, the data for each company may have to be adjusted and margin programs adjusted, re-run, and checked for errors. There is a significant amount of data for each company, and the dumping programs are complicated. In addition, decision memoranda relating to the determination and the determination itself must be drafted, circulated, cleared and published. For these reasons, the United States estimates that 30 days will be necessary to issue the recalculations upon which interested parties will provide comment.

24. Beyond omitting time for the recalculation of margins, Japan's proposal understates the period of time for comments required by Section 129(d) and Antidumping Agreement Article 6.2. Japan attempts to justify this by mischaracterizing the time required during the investigation. It did not take a month to issue a final determination, as Japan asserts: it took 75 days. In its submission, Japan started the clock arbitrarily at the issuance of the verification report. This report describes whether the information submitted by the parties was supported or not. But it is the preliminary determination that the parties are commenting on, and it is this comment process that required 75 days in the investigation. The preliminary determination was

issued on February 12, 1999. Thus, parties had some 59 days to prepare their comments – not 17 days, as Japan suggests. Thus, Japan understates the comment and recalculation period in the investigation by *42 days*. I would note at this point that the United States is now proposing to issue a final determination only 60 days after it issues the initial proposed determination.

25. Another way in which Japan understates the period required for administrative implementation in this case is by omitting the time required after the final determination to receive comments on and correct any ministerial errors, which, Japan admits, required 30 days during the investigation. In addition, when implementing a WTO recommendation, the United States must also consult with Congress concerning Commerce's final determination before it is implemented, pursuant to Section 129(b)(3), direct Commerce to implement pursuant to Section 129 (b)(4) and publish a notice of implementation pursuant to Section 129(c)(2). The United States intends to do this during the 30 day period used for clerical errors in the investigation, abbreviating the latter period.

26. The United States finds it strange that Japan would want to limit the availability of time for notice, comment and corrections, because these requirements are, in significant part, intended to protect the interests of the Japanese respondents themselves -- to give Japanese exporters sufficient time and opportunity to review and comment on the decisions and the calculations. As we noted in our written submission, the redetermination in this antidumping investigation will be complicated and based both on legal and policy decisions and on the manipulation of vast quantities of data. Both the U.S. regulations and experience dictate that certain minimum periods

of time are necessary to allow all parties – both Japanese and U.S. – to review the determinations and make comments, and then to review any final calculations for errors. Our four-month proposal is based on those minimum periods of time. We have little doubt that if the United States were to apply the time frames Japan now proposes in any other context, Japan would not hesitate to challenge them in U.S. courts and the WTO. Indeed, we recall that Japan specifically based its successful claim concerning "facts available" in this dispute on its argument that Commerce had to accept data which the Japanese respondent submitted well after the already extended deadlines of the investigation, deadlines totaling 87 days, or almost three months.

27. Mr. Feliciano, you should therefore include four months — which is still less than the time allowed in a normal antidumping investigation and less time than has ever been awarded in an arbitration for an administrative change — for the portion of the reasonable period of time that follows any legislation.

Conclusion

28. In conclusion, given the nature and the complexity of the U.S. legislative process, as well as the previous record of how long it takes for legislative implementation, it would be unreasonable to allow less than a full legislative session to complete any necessary legislation. Following any such legislation, both U.S. legal requirements and fundamental due process considerations dictate that an additional four months be allowed to complete implementation. This adds up to a total "reasonable period of time" of 18 months from adoption.